BEARING THE BURDEN
THE EFFECTS OF MINING ON FIRST NATIONS IN BRITISH COLUMBIA

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SUMMARY

Rich in mineral resources, the traditional lands of First Nations in British Columbia (B.C.) have been targets of Canada's active mining industry. Mining provides important revenue for the province, so many people welcome it. It also, however, frequently interferes with First Nations' use of their traditional lands and significantly harms the environment to which their culture is inextricably linked. B.C. mining laws provide some safeguards for First Nations and the environment, but they favor the industry they are intended to regulate and do not adequately institutionalize the special protections First Nations are entitled to under international and domestic law. While some First Nations have benefited from mining within their boundaries, in general, First Nations bear an unfair burden at every point in the mining process,[1] from the registration of claims to exploration, production, and abandonment of closed sites. Urgent law reform is needed to shift at least some of that burden onto government and industry. Current law presumes that mining is an acceptable use of a piece of land, but the presumption should instead be that aboriginal rights require heightened scrutiny of mining activities. Reform should ensure

[1] The Mineral Tenure Act (MTA) defines "mining activity" as "any activity related to" the search for minerals, "exploration and development of a mineral," or "the production of a mineral," "and includes the reclamation of a previously mined area and the monitoring and long term protection, control and treatment of a previously mined area." Mineral Tenure Act, R.S.B.C. ch. 292, part 1 (1) (1996) (Can.), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96292_01. This report will use the MTA's definition and will specify when referring to a specific stage of the process.

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more First Nations' involvement in decision-making, increase environmental and cultural protection, and balance the potential benefits among all key stakeholders.

The experiences of Takla Lake First Nation, which is based in remote northern British Columbia, illustrate that the province's mining laws are a problem in practice as well as on paper. While Takla has good relations with some mining companies, it has generally been ambivalent or even hostile to new projects. This attitude stems largely from the fact that community members feel excluded from the process that reviews proposals and inundated with mining claims and projects on their traditional territory. In addition, Takla—home to exploration sites, a major open-pit mine, and several abandoned operations—has seen the range of harms caused by different stages of mining. Members of Takla widely report destruction of habitat, a decrease in wildlife, and a fear of health problems from contaminants. Because of Takla's close ties to the land, these effects cause cultural as well as environmental injury. Finally, even those members who are willing to accept mining say that they have not received the benefits that are supposed to accrue from the industry—in particular, revenue sharing and employment opportunities. Takla's story—its experience with disenfranchisement and harms accompanied by few benefits—illustrates that the current legal regime needs reform to better preserve First Nations' lands and culture.[2]

The situation is particularly troublesome given that international and Canadian law require special protections for First Nations. Canada is party to international human rights and environmental treaties that recognize the unique connection between indigenous peoples and the

[2] The unfair burden that First Nations in British Columbia bear could be described as an environmental injustice. In other words, mining in the province causes a disproportionate negative effect on a disadvantaged group and gives disproportionate benefits to those outside that group. While this report will present its arguments in terms of aboriginal rights rather than environmental justice, its call for burden and benefit sharing is consistent with both frameworks.

land. First Nations have the right to self-determination, which includes the right to decide how their traditional lands and resources are used. They also have a right to practice their culture, which requires the use of traditional lands. Treaty law not only enumerates these rights but also obligates Canada to ensure First Nations are able to enjoy them. In addition, Canada has a duty under international environmental law to encourage sustainable development and protect the quality of its environment. The Canadian Constitution, meanwhile, establishes aboriginal rights at the domestic level, and a growing body of Canadian case law, notably the 2004 *Haida Nation v. British Columbia* decision, has strengthened the protection of First Nations by mandating consultation with and accommodation of the communities. Consultation and accommodation by the government mandate "good faith efforts to understand each other's concerns and move to address them."[3]

International and constitutional standards thus provide a framework for the protection of First Nations that calls for heightened scrutiny of projects affecting these indigenous peoples and the incorporation of aboriginal rights into domestic mining law. The standards are designed to give First Nations a voice in decision-making through consultation and an assurance that the environment with which they are linked is healthy. B.C. mining laws on their face and in their implementation, however, fail to guarantee either.

Harvard Law School's International Human Rights Clinic (IHRC) has based this report on a field mission to Takla's traditional territory and surrounding areas in September 2009 and follow-up research through May 2010.[4] The IHRC team conducted at least fifty interviews with

[3] Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, ¶ 49 (Can.).
[4] IHRC has done extensive work on human rights and the environment issues, including on mining in Africa, the Americas, and Asia. It decided to investigate the situation in British Columbia after learning about the controversy over free entry although the final report covers much more. IHRC chose to focus its field research on Takla Lake

representatives of First Nations (especially Takla), the B.C. government, and the mining industry.[5] During its field mission, the team made personal observations of the environmental damage that mining, including exploration, has caused in Takla's traditional territory.[6] It has also drawn on a range of legal sources for an extensive analysis of international and domestic aboriginal rights law and B.C.'s mining law.[7]

After making recommendations to government, industry, and First Nations, this report expands on the issues laid out in the summary in greater depth. It opens with a background chapter about Takla and an overview of international and domestic aboriginal rights law. The report then analyzes the problems mining raise for First Nations in detail. It provides an extensive legal analysis of the existing mining regime. It also documents the situation of Takla, describing the band's experiences with and opinions about lack of consultation, harms of mining, and lack of benefits. It concludes that structural, procedural, and substantive legal reforms are needed firmly to establish the heightened protections to which Takla is legally entitled and better to balance the burdens and benefits of mining.

First Nation because the mineral-rich nature of its traditional territory has led to a particular vulnerability to and extensive experience with mining.

[5] The IHRC team conducted interviews with thirty-one members of Takla, including chief and council, *keyoh* holders, and individuals who had worked in mining. It spoke with representatives of other First Nations and Takla's former and present mining coordinators and lawyer. It also interviewed officials from the Ministry of Energy, Mining and Petroleum Resources, the Ministry of Environment's Environmental Assessment Office, and the Ministry of Agriculture and Land's Crown Lands Restoration Branch. Finally, it had interviews with representatives of industry, including leaders of two companies that operate within Takla's traditional territory and two provincial mining associations. Other companies provided additional information in written form.

[6] During its field mission, the IHRC team visited an abandoned mine (Bralorne-Takla), a current exploration project (Kwanika), and sites near proposed operations (Aiken Lake and Bear Lake).

[7] This report does not address mining regulations in other Canadian provinces, nor does it address important issues regarding First Nations relations with other industries, such as logging or fishing, or with the B.C. government generally.

Background on Takla Lake First Nation

The Takla Lake First Nation, which consists of approximately 1000 members, has a traditional territory—the land it has historically used and occupied—of approximately 27,250 square kilometers of mineral- and timber-rich country. As for most First Nations, the land is essential to the identity and survival of Takla. Many members still depend on traditional subsistence activities, such as hunting and gathering, for food and medicine. Subsistence activities also serve important social and cultural functions. Passing on this way of life links generations, and Takla is currently engaged in a conscious effort to revive and maintain its heritage. A spiritual connection to the land makes them respect it and teaches them not disturb it unless necessary.

Takla's traditional governance structure reflects this close relationship to the land. Known as the potlatch system, it is centered around *keyohs*, families' traditional tracts of land. A family leader represents the *keyoh* at community gatherings and is commonly described as "speaking for the land." The names these *keyoh* holders inherit often indicate their responsibilities to the environment. The name "wise fish," for example, belongs to a man who must protect the water so that fish can safely spawn.

The Canadian government, however, banned the potlatch system for many years and created an alternative governance structure—an elected chief and four council members—that still survives. The existence of two types of spokespeople sometimes creates tensions because government officials communicate primarily with chief and council as representatives of the whole community while ignoring *keyoh* holders who "speak for the land."

Use of local First Nations' resources began with the fur trade and then turned to logging. The latter in particular changed the environment and Takla's relationship to it. For example, it

made hunting more difficult because of a decline in caribou. As logging has started to decline, mining has risen to take its place as the key extraction industry in northern British Columbia and on Takla's traditional territory.

As mentioned above, Takla has experienced mining operations at all stages in the process. Claims, which give holders exclusive rights to explore an area for minerals, blanket the majority of its territory. Their prevalence is thanks in large part to free entry, a regime that allows almost anyone to register a claim without consulting landholders. Companies, such as Alpha Gold, CJL Enterprises, and Serengeti Resources, have turned many of those claims into exploration sites, where they test the sub-surface soil and rock for the presence of minerals. Representing the next stage of the process are actively producing mines, i.e., those that extract minerals from the ground for sale. The most notable in this region is Northgate's Kemess South Mine, a large open-pit operation in the north of Takla's traditional territory. Finally, while inactive, abandoned mines, including Bralorne-Takla and Ogden Mountain, pose lingering risks of contamination and no longer have identifiable corporate owners to hold responsible for their cleanup.

The Legal Regime Governing Mining

The legal regime that governs this activity on Takla's territory consists of a complex collection of laws that can be difficult to understand and navigate. Provincial land-use planning, in the form of Land and Resource Management Plans (LRMPs), has determined what land is open to mining, but the government and First Nations advocates disagree about the effectiveness of the consultation efforts during that process.

The rest of the laws are administered by multiple B.C. agencies, particularly the Ministry of Mines, Energy, and Petroleum Resources (MEMPR), the Ministry of Environment, and the Ministry of Agriculture and Lands. MEMPR's principle of free entry permits claim registration, or staking, with no consultation. Its recent online version called Mineral Titles Online (MTO) allows miners from anywhere in the world to register at the click of a button; they must pay only a small fee and do not have to speak with traditional landholders. Companies that want to pursue exploration must submit a Notice of Work (NOW), which the government forwards to First Nations; however, the process usually gives First Nations only thirty days to respond with any concerns. The tight deadline combined with the shortage of information to which First Nations have access makes it unrealistic to prepare an adequate response. In addition, the NOW process provides only limited environmental protection and takes place after some harm has occurred.

The Ministry of Environment's Environmental Assessment Office conducts a more rigorous review, in the form of environmental assessment, when a company seeks to move from exploration to development (preparation for production) and production itself. Even here, however, First Nations argue that, in implementing the environmental assessment, the government and mining companies do not take their rights and environmental concerns fully into account. Much of the design of the process is left to the discretion of a government official. Furthermore, First Nations again receive incomplete information and have limited resources to supplement it when they want to build a case against a particular project.

Finally, the government bears legal responsibility for abandoned mines that predate a 1969 remediation bond requirement and have no clear private owner. The Ministry of Agriculture and Lands' Crown Lands Restoration Branch, formed only in 2003, oversees their

remediation. Its limited resources combined with extensive studies can slow cleanup of sites that potentially contaminate First Nations' traditional territories.

While international and domestic aboriginal rights law mandate added protections for First Nations and require that projects are subjected to higher scrutiny for possible adverse effects, the B.C. legal regime and its implementation regularly fall short of that standard. They favor industry, leave great discretion to government, and deny First Nations an effective means to have a say in what happens to their land.

Takla's Experience

Takla's experiences with mining exemplify the unjust situation British Columbia's imbalanced mining laws create. The lack of consultation imposes on Takla the burden of overcoming, without access to full information, the presumption that individual mining projects are acceptable on their land. When Takla fails to prevent or ensure adequate regulation of mining, it bears the consequences of adverse environmental and cultural impacts. Finally, to exacerbate these inequities, its members receive disproportionately few benefits from the industry. Cumulatively, these difficulties infringe on Takla's enjoyment of its aboriginal rights to use its land and participate in decision-making regarding its land.

During interviews, Takla's members voiced particularly adamant criticism of the lack of consultation. Because free entry does not require consultation, they often only learn about claims registered on their traditional lands through chance encounters with miners. These encounters have become rare since the advent of online registration, yet the number of claims has

skyrocketed.[8] Takla's leaders said they are overwhelmed with NOWs for exploration proposals. They have neither the time nor the financial resources to conduct in-depth studies to supplement the superficial information they receive and to identify any problems before the deadline. Even when they do respond, their former mining coordinator said, "99.9 percent of the time" the government dismisses their objections. Mining companies sometimes voluntarily consult with Takla directly, and the band often seems to trust them more than the government. These efforts to reach out, however, take place on an *ad hoc* basis and have had mixed results. To complicate matters, confusion exists among all parties about whether government and industry should consult with chief and council or *keyoh* holders and which of these representatives of Takla have final say on a proposal.

While exploration permits are the most common challenges it faces, Takla has had, at least on one occasion, more success having a voice at the environmental assessment stage, where production proposals are reviewed. Takla participated in a groundbreaking process involving a proposed open-pit mine at Kemess North. The government agreed to create a joint review panel—consisting of representatives of the province, federal government, and First Nations—to evaluate the proposal. In the end, after the panel submitted its recommendation, the Minister of Environment rejected the application for the mine. While this result was a victory for the coalition of First Nations opposing the project, it was the first time such a panel had been appointed and the law does not require that such a panel conduct the environmental assessment in every instance.

In addition to experiencing a lack of consultation, Takla has seen evidence of the harms mining can cause. While open-pit mines can completely destroy their areas, exploration sites,

[8] See map "Claims Registered on Takla Lake First Nation's Traditional Territory" in this report.

which are more common, have a significant cumulative effect in the environment. Deforestation for roads, spurs, and drill pads combined with noise pollution have disrupted habitat, and members of Takla report a decline in the wildlife they hunt. In addition, they fear the effects of contamination from the many chemicals that different stages of the mining process require. The presence of abandoned mines, such as the sixty-year-old Bralorne-Takla mercury mine whose contaminants are potentially linked to a cluster of illnesses, heighten the concern that exposure to poisons could affect human health. The government and mining companies often argue that the problems are not as serious as Takla portrays, and IHRC does not have the scientific expertise to determine the exact environmental and health effects of mining on Takla's traditional territory. Nevertheless, eyewitness reports and IHRC observations suggest that some harm does occur and that there is a need for independent studies—not done by government, industry, or First Nations—to allay or provide support for Takla's fears.

Mining also threatens Takla's culture and spiritual life. The registration of claims without consultation may be viewed as culturally insulting to Takla given their historic occupation and claims to traditional lands. At later stages of the process, environmental degradation interferes with Takla's subsistence hunting, food gathering, and use of medicinal plants, and with the transmission of cultural knowledge that accompanies those activities. Finally Takla members generally feel a spiritual connection to the land, and some told IHRC that they experience personal pain when they see the environment injured by mining.

While Takla feels the burden of a lack of consultation and faces environmental and human consequences from mining, the community receives few of the direct economic benefits that should accompany mineral development. Many members of Takla said they would like to see revenue sharing, but most mining in the region is at the exploration stage and exploration is

not a profitable venture. Northgate reportedly has such financial compensation agreement with Takla and residents of *keyohs* near the producing Kemess South Mine, but several recipients called it inadequate. In 2008, the B.C. government has adopted a revenue-sharing program, under which the revenue generated through permitting and regulation procedures will be shared with affected First Nations. The program recognizes that First Nations should share in the economic gains of mining, but Takla has received no benefits from it yet, and the program applies to only newly approved projects, not to existing ones. Takla members also repeatedly called for jobs and associated training. Some mining companies voluntarily enter into *ad hoc* employment agreements with Takla, but these jobs are seasonal and, given the nature of the work, rarely provide health benefits. They are also limited in number because they often require skills that members of Takla and other First Nations do not possess.

Recommendations

To help shift the burden of mining off First Nations and to increase respect for their aboriginal rights, this report makes recommendations to each of the key stakeholders. The government should recognize aboriginal rights as a guiding principle of any development decision that affects First Nations, thus solidifying the presumption that First Nations are entitled to heightened protections. The government should clarify the requirements of meaningful consultation and initiate it from the beginning of the mining process because once the momentum of a project gets started it is hard for First Nations to stop it. The government should also facilitate independent studies of environmental and human rights impacts, impose more stringent requirements on proposed mining projects, expeditiously clean up abandoned mines, and encourage the sharing of mining's economic benefits with First Nations.

This report also makes recommendations to industry and First Nations. Mining companies should acknowledge that indigenous peoples have special rights and interests and take them into account in their interactions with First Nations. They can do so by increasing consultation efforts and negotiating, in a fair and transparent manner, to share the benefits of mining. At the same time, Takla and other First Nations should internally determine their wishes, such as their desired means of consultation and how many and what type of benefits they want. They should then clearly convey these preferences to other stakeholders. Takla in particular should also finish its land-use plan so that all parties know where it is willing to permit mining and where traditional uses or spiritual significance make mining unacceptable.